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## I. Introduction

At first reading, the law of arrest in Pennsylvania seems completely straightforward, logical, and historically familiar. The Rules of Criminal Procedure[1] seem to indicate clearly when arrests can be made and when warrants are required. The common law of arrest based on the classification of an offense as either a felony or a misdemeanor is carried forward and articulated in the rules. Further, the Pennsylvania Crimes Code,[2] which had the Model Penal Code[3] as its principal progenitor, employs the conventional classification of offenses as felonies or misdemeanors as a central feature of its structure. Because of the very traditional appearance of the law in this area, it would be fair to assume that most of the significant issues regarding arrest matters had been adequately addressed.

But while the law of arrest in Pennsylvania looks quite familiar, in fact, the surface appearance is very misleading. Indeed, the surface structure is itself something of a mirage. What one thinks one sees turns out, in reality, not to be there. Moreover, there exists an entirely subterranean world of the law of arrest in Pennsylvania that one gets only the slightest hint of in the primary law. Examples will best illustrate this by testing your knowledge and maybe even your common sense about the operation of the rules. Consider these two fact situations:

*Case Number One.*—At 8:00 p.m. on a busy city street, a pedestrian is struck by an automobile. While sixteen witnesses watch, the driver of the car momentarily stops, looks back at the pedestrian now lying in the street, and then rapidly drives away. Within ten seconds, a police officer arrives on the scene, observes the person lying in the street, hears the statements of the sixteen bystanders, and obtains

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1. PA. R. CRIM. P. 1-9998.
2. 18 PA. CONS. STAT. §§ 101-9183 (1982 & Supp. 1986).
3. MODEL PENAL CODE (Proposed Official Draft 1962) [hereinafter MODEL PENAL CODE].

the same license plate number and description of the vehicle involved from all sixteen people. The officer relays by radio the information that he has observed and obtained. Fortuitously, at the time this first officer's broadcast is made another police car is in traffic behind the described vehicle at a place very close to the scene of the incident. The total elapsed time from the striking of the pedestrian to locating the car that was involved was no more than five minutes. Can the driver of the car be arrested?

*Case Number Two.*—A small municipality that is deeply concerned about the aesthetic appearance of its community has passed an ordinance requiring homeowners to mow their lawns. The ordinance prohibits homeowners from allowing the grass in their lawns to grow to a length of more than five inches and imposes a five dollar penalty. A police officer of the municipality sees homeowner Jones (who is known personally to the officer) standing on the sidewalk in front of his (Jones') house. The officer, while on the sidewalk himself, with his handy ruler, measures Jones' grass and determines that it is seven inches tall. Can he arrest Jones?

If you learned that the police officer in case number one probably could not arrest the "hit and run" driver, would you be surprised? If you learned that the police officer in case number two might very well be authorized to arrest Jones, would that surprise you? If you are not surprised, then you need to read no further. If, however, you are surprised by these answers, then perhaps a narrow article on the law of warrantless arrests by police officers will have some value.

## II. Pennsylvania Adopts (Sort of) the Common Law

### *A. The Common Law Rules of Arrest in Pennsylvania*

The law of arrest in Pennsylvania seems susceptible to a succinct and forthright set of rules. Like the common law from which it was derived,[4] present Pennsylvania law authorizes an arrest for any offense when a warrant has been issued.[5] In addition, there are a variety of situations in which an arrest can properly be made without a warrant. The starting point for this authorization is Rule 101 of the Rules of Criminal Procedure which provides:

4. *See* Wilgus, *Arrest Without Warrant*, 22 MICH. L. REV. 541 (1924) [hereinafter Wilgus]; Waite, *Some Inadequacies in the Law of Arrest*, 29 MICH. L. REV. 448 (1930); Note, *Philadelphia Police Practice and the Law of Arrest*, 100 U. PA. L. REV. 1183 (1952); *see also* McCarthy v. De Armit, 99 Pa. 63 (1881).

5. *See* PA. R. CRIM. P. 101, 102, 119-124.

> Criminal proceedings in court cases shall be instituted by:
>
> . . .
>
> 2. an arrest without a warrant when the offense is a felony or a misdemeanor committed in the presence of the police officer making the arrest; or
>
> 3. an arrest without a warrant upon probable cause when the offense is a felony; or
>
> 4. an arrest without a warrant upon probable cause when the offense is a misdemeanor not committed in the presence of the police officer making the arrest, when such arrest without a warrant is specifically authorized by statute.[6]

Sections 2 and 3 of Rule 101 are the simple restatements of the common law rules of warrantless arrest.[7] As these subsections indicate, the validity of a warrantless arrest under the rule will turn on the categorization of the offense as either a misdemeanor or a felony. To restate the rule for purposes of emphasis, a warrantless arrest is totally authorized for felonies, regardless of whether it was committed in the officer's presence, whenever the officer has probable cause to believe a felony has been committed because of information received from some other source or because he has personally witnessed it. However, no warrantless arrest is authorized for a misdemeanor not committed in his presence, regardless of how good the probable cause is unless there is separate legal authorization for such an arrest to come within section 4 of Rule 101.[8]

The restatement of the common law rules of warrantless arrests in sections 2 and 3 of Rule 101 hardly seems remarkable. Indeed, precisely because they are only reiterations of centuries-old common law rules, it is hard to imagine any difficulties arising from them. Apparently there are no fourth amendment problems associated with these rules since the Court in *United States v. Watson*[9] held that warrantless arrests for felonies are constitutionally permissible. At

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6. PA. R. CRIM. P. 101.

7. *See* McCarthy v. De Armit, 99 Pa. 63 (1881); *see also* Wilgus, *supra* note 4, at 567-73.

8. Special legislative authorizations for warrantless arrests in cases of non-felonies, not committed in a police officer's presence, have been made in several instances. Discussion of these will be postponed until later, however, since they have unique, difficult, and indeed, troubling problems of their own which require a separate treatment. *See infra* text accompanying notes 47-48.

9. 423 U.S. 411 (1976). *Watson* upholds the validity of a warrantless felony arrest under the fourth amendment. *Watson* does not address warrantless misdemeanor arrests, but the way the Court discussed the common law rules of arrest suggests that the Court would also find warrantless arrests made for misdemeanors committed in the officer's presence to be constitutional. *See infra* text accompanying note 61; *see also* Ker v. California, 374 U.S. 23 (1963).

least that seems to be true when the arrest is made in a public place so as not to run afoul of *Payton v. New York*.[10] This Article, however, will indicate that very real problems exist with warrantless arrests made in public places under present day Pennsylvania law.

### *B. The Felony/Misdemeanor Distinction*

To the extent that the common law and the Pennsylvania rules of warrantless arrests turn on the distinction between whether the offense is a felony or a misdemeanor, it might be helpful to have some understanding of what those terms mean.[11] Indeed, with some background information concerning the term "felony," a beginning can be made of a portrayal of some of the issues that exist in Pennsylvania today.

Blackstone provided the basic description of the term: "Felony, in the general acceptation of our English law, comprises every species of crime which occasioned at common law the forfeiture of lands and goods."[12] These crimes included: felonious homicide (murder and manslaughter), mayhem, arson, rape, robbery, burglary, larceny, prison breach (only for a while), rescue of a felon, and sodomy (arguably).[13] Today, of course, felonies are not defined with respect to the potential forfeiture of lands or goods. The punishment that can be imposed, however, is still one of the central motivations for classifying offenses as either felonies or misdemeanors. One textbook surveying the modern definitions of felony in the United States indicates that generally the term applies to "any crime punishable by death or imprisonment for more than one year (or occasionally, for one year or more) . . . and that any other crime is a misdemeanor."[14] Similarly, the Model Penal Code states: "A crime is a felony if it is so designated in this Code or if a person convicted thereof may be sen-

10. 445 U.S. 573 (1980); *see also* Welsh v. Wisconsin, 466 U.S. 740 (1984).

11. Unfortunately, it will not be as helpful as one might think. In Pennsylvania, there have been no statutory or case law definitions of the term "felony." Pennsylvania courts have, on a number of occasions defined the term "misdemeanor," but these cases always arose in the form of whether the acts of the defendant amounted to an offense under the law at a time when the state still had common law crimes. The question was whether the acts amounted to a misdemeanor or no crime at all. They did not discuss the distinction between a felony and a misdemeanor. *See* Commonwealth v. McHale, 97 Pa. 397 (1881); Commonwealth v. Mochan, 177 Pa. Super. 454, 110 A.2d 788 (1955); Commonwealth v. Orris, 136 Pa. Super. 137, 7 A.2d 88 (1939); Commonwealth v. Miller, 94 Pa. Super. 499 (1928).

12. 4 W. BLACKSTONE, COMMENTARIES *152.

13. *See* R. PERKINS & R. BOYCE, CRIMINAL LAW 14 (1982). Treason was in a separate category from felony but had almost all of the same consequences as a felony. *Id.* The reason that sodomy is only arguably a common law felony is that it was made an offense by a statute, but it is said that the statute is old enough to be part of the common law. *Id.* at 14-15.

14. W. LAFAVE & A. SCOTT, CRIMINAL LAW 30 (1986).

tenced [to death or] to imprisonment for a term which, apart from an extended term, is in excess of one year."[15]

Under these definitions, it is clear that a legislature can declare which crimes are felonies and which are not since they have the power to fix the penalties for offenses. In some states, this is done in a way that conforms with the Model Penal Code automatic assignment of the class of the offense depending upon the punishment prescribed.[16] Other states classify each separate offense within its own definition.[17] Consequently, either by specifically declaring an offense to be a felony or by assigning a potential penalty in excess of the established dividing line between a felony and a misdemeanor, the state legislatures ostensibly have the power to control the validity of a warrantless arrest.

There are serious problems lurking here. Can a legislature declare relatively minor offenses to be felonies and thereby enable warrantless arrests? This question was raised by Justice Marshall's dissent in *United States v. Watson*:

> [B]y paying no attention whatever to the substance of the offense, and considering only whether it is labelled "felony," the Court, in the guise of "constitutionalizing" the common-law rule, actually does away with it altogether, replacing it with the rule that the police may, consistent with the Constitution, arrest on probable cause anyone who they believe has committed any sort of crime at all. Certainly this rule would follow if the legislatures redenominated all crimes as "felonies." As a matter of substance, it would seem to follow in any event from the holding of this case, for the Court surely does not intend to accord constitutional status to a distinction that can be readily changed by legislative fiat.[18]

What are the limits on the legislative power to declare an offense a felony? Clearly, "felony" is not a term of art that applies only to the common law crimes that were felonies. First, the argument for inclusion of the statutory offense of sodomy as a common law felony was that the statute is old enough to be considered part of

15. MODEL PENAL CODE *supra* note 3, § 1.04(2).

16. *See supra* text accompanying note 15. *See also* discussion in the revised comments, MODEL PENAL CODE § 1.04 (Proposed Official Draft and Revised Comments 1985). The Model Penal Code also designates each offense that it establishes with a classification.

17. This was the Pennsylvania scheme prior to adoption of the Crimes Code. *See* JOINT STATE GOVERNMENT COMMISSION, PROPOSED CRIMES CODE FOR PENNSYLVANIA § 107 comment (1967).

18. 423 U.S. 411, 454 (1976) (Marshall, J., dissenting).

the common law.[19] This patently indicates the historical power of legislative creation of felonies. Second, and perhaps most important, the *Watson* case,[20] at a minimum, stands for the proposition that authorization, through classification of offenses, of warrantless arrests for some non-common-law felonies is constitutionally within the legislature's power. The offense for which Watson was arrested, possession of stolen mail,[21] was obviously not one of the common law felonies.

All of this suggests that very real problems exist with the potential legislative ascription of the term "felony" to minor offenses. In Pennsylvania, however, just the opposite problem seems to be the case because the legislature has restricted the term "felony" to a strikingly limited number of offenses.

In 1972, Pennsylvania enacted a new crimes code which consolidated most principles of criminal liability and many crimes and defenses into one title of the Pennsylvania statutes.[22] Although there have been changes to this code since then, the 1972 Code is still the basis of the present day Pennsylvania Crimes Code. The 1972 Code derived from a "Proposed Crimes Code for Pennsylvania" (hereinafter the "Draft Code"), which was prepared by the Joint State Government Commission and published in 1967.[23] The Draft Code, in turn, is taken extensively (indeed, just short of entirely) from the American Law Institute's Model Penal Code.[24] Like the Model Penal Code,[25] the Draft Code[26] and the 1972 Crimes Code[27] provided classifications of offenses. Several classes were established: murder in the first and second degree, three degrees of felonies, three degrees of misdemeanors, and summary offenses.[28] Essentially, this was in complete accord with the pattern established by the Model Penal Code.

But then Pennsylvania did something quite different. It substantially altered the penalties ascribed to the classes of crimes.[29] One effect of this was to permit a wider range of sanctions for offenses

19. *See supra* note 13.
20. 423 U.S. 411 (1976).
21. 18 U.S.C. § 1708 (1982).
22. 18 PA. CONS. STAT. § 101-9183 (1982 & Supp. 1986).
23. JOINT STATE GOVERNMENT COMMISSION, PROPOSED CRIMES CODE FOR PENNSYLVANIA (1967) [hereinafter DRAFT CODE].
24. *Id.* at vii.
25. MODEL PENAL CODE *supra* note 3, § 1.04.
26. DRAFT CODE *supra* note 23, § 107.
27. 18 PA. CONS. STAT. § 106 (1982).
28. 18 PA. CONS. STAT. § 106(b) and (c) (1982).
29. 18 PA. CONS. STAT. §§ 106, 1103-05 (1982).

than was available in the Model Penal Code.[30] As a free-standing scheme of sentencing, it has much to commend it.[31] A collateral consequence of this basic structure, however, was the designation as misdemeanors of many offenses that would be felonies under the laws of almost every other state and the Model Penal Code. Thus, while under the Model Penal Code the dividing line between misdemeanors and felonies was imprisonment for more than one year,[32] the Pennsylvania Crimes Code set up the following schedule:[33]

| Class of Offense | Maximum (i.e. Potential) Sentence |
|---|---|
| Felony First Degree | 20 Years |
| Felony Second Degree | 10 Years |
| Felony Third Degree | 7 Years |
| Misdemeanor First Degree | 5 Years |
| Misdemeanor Second Degree | 2 Years |
| Misdemeanor Third Degree | 1 Year |
| Summary Offenses | 90 Days |

As a result, the implicit definition of a felony in Pennsylvania is an offense that is punishable by a potential term of imprisonment of more than five years.[34] This classification makes many offenses misdemeanors with quite substantial punishments. This, in turn, has a significant collateral consequence in the area of the law of arrest. While it is far from clear why Pennsylvania chose to alter the Model Penal Code's classification of crimes, it appears that very little consideration, if any, was given by the drafting committee[35] of the Pro-

30. The Model Penal Code established three grades of felonies in § 6.01. But the crimes that Pennsylvania graded as misdemeanors would have come within the felony grade of the Model Penal Code. *See* discussion *infra* note 33 and accompanying text.

31. *Compare* 18 PA. CONS. STAT. §§ 1103, 1104 (1982) *with* MODEL PENAL CODE *supra* note 3, § 601.

32. MODEL PENAL CODE *supra* note 3, § 104(2).

33. 18 PA. CONS. STAT. § 106(b) and (c) (1982); *see also* DRAFT CODE *supra* note 23, § 107.

34. Although the Crimes Code does not specifically define the term "felony" it does provide: "A crime is a misdemeanor of the first degree if it is so designated in this title or if a person convicted thereof may be sentenced to a term of imprisonment, the maximum of which is not more than five years." 18 PA. CONS. STAT. § 106(b)(6) (1982).

35. There is no mention in the Draft Code of any consideration of the collateral consequences of the change. On March 13, 1987, this author spoke by telephone with Professor Louis Schwartz, presently on the faculty at the law school of the University of California at Hastings. Professor Schwartz had been a member of the drafting committee of the Draft Code. He indicated that he had no recollections of any discussions by the drafting committee of any wider aspects brought about by the changes in classifications other than those that related directly to sentencing. He indicated that the committee's primary concern was to widen the sentencing alternatives. The remarks by the chairman of the Senate Judiciary, Senator Hill, on the floor of the Senate with regard to the Crimes Code bill bear this out. Senator Hill stated:

posed Code or the legislature[36] to the effect these changes would have beyond the Crimes Code. Yet, the result is dramatic.

Recall, for the sake of demonstration, the "hit and run" case posed above in the introduction. The Pennsylvania Vehicles Code makes it an offense for a driver of a vehicle to leave the scene of an accident without stopping and identifying oneself and, if necessary, rendering aid. Some of the statutes impose different obligations and penalties depending on whether the vehicle or property damaged in an accident was attended or unattended.[37] In another statute, a more serious offense is established — leaving the scene of an accident in which death or personal injury is caused.[38] This offense, however, is graded as a misdemeanor of the first degree.[39] Thus, while such an offender could be sentenced to a term of imprisonment up to five years,[40] he could not be arrested under Rule 101 since it is graded as a misdemeanor and did not occur in the police officer's presence.

Apart from the "hit and run" offense, might some other underlying offense permit an arrest? For example, if the officer at the scene was able to easily determine that the pedestrian was dead, would homicide by vehicle[41] permit an arrest under the Vehicle Code? As long as the driver was not under the influence of alcohol or a controlled substance,[42] the answer is no. Homicide by vehicle is a misdemeanor of the first degree. Even a charge of involuntary manslaughter under the Homicide section of the Crimes Code[43] is only a misdemeanor of the first degree.[44]

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> The main point that the bill does, Mr. President, is classify the crimes. Today we have penalties against particular crimes assessed at the time the bill dealing with that crime is passed, and it is done without any reference to what the prior law was, or sister-and-brother laws, shall we say, dealing with similar offenses . . . . Now we have attempted to classify the crimes into seven categories. . . .
>
> In this way, Mr. President, it attempts to even out the disparity of the many different offenses today for which there is no rhyme or reason for the various penalties, because they were just passed as of that particular moment or when that particular offense was made a crime, and they do not relate to each other. This is a very bad feature of the present law . . . .

PA. SENATE JOURNAL 1633 (Sept. 12, 1972).

36. *See* PA. SENATE JOURNAL, 1633-1637; 1647; 1696-1698; 2022-2023 (Sept. 12, 13, 25 and Nov. 30, 1972).

37. 75 PA. CONS. STAT. §§ 3743-45 (1984).

38. 75 PA. CONS. STAT. § 3742 (1984) as amended 1986 Pa. Legis. Serv. 135 (Purdon).

39. Only if leaving the scene itself materially contributes to the death of a person is the offense a felony. 75 PA. CONS. STAT. § 3742 (1984) as amended 1986 Pa. Legis. Serv. 136 (Purdon).

40. 18 PA. CONS. STAT. § 106(b)(8) (1982).

41. 75 PA. CONS. STAT. § 3732 (1984).

42. 75 PA. CONS. STAT. § 3735 (1984).

43. 18 PA. CONS. STAT. § 2504 (1982).

44. 18 PA. CONS. STAT. § 2504(b) (1982). Additionally, the lesser offense of reckless

This effect of a combined reading of the Crimes Code definitions of felony and misdemeanor with the Rules of Criminal Procedure's law of arrest arises in a wide variety of instances beyond those presented in the "hit and run" situation. The result in many instances is that Pennsylvania law does not allow arrests when they would be authorized by the laws of most other states[45] and the Model Penal Code.

An argument can be made that there is nothing wrong with this result. It could be suggested that Pennsylvania is a very enlightened and progressive state on the forefront of protecting its citizens from being unnecessarily subjected to the indignities of an arrest when a citation, summons, or warrant could be used against the offenders. In some cases the present classification of offenses has the highly desirable effect of not permitting a person to be arrested without a warrant, thus protecting individual liberties. It does not matter that this result comes only as an afterthought, rather than a pre-planned policy decision. On the other hand, there can be very serious problems with an excessively restrictive arrest law.[46] The merits of these arguments could be debated if a policy regarding the limited power of arrest were a consistent or even identifiable policy in the Commonwealth. Unfortunately, it is nearly impossible to articulate a coherent policy in Pennsylvania when the remainder of the law of arrest is considered.

## III. Where Otherwise Authorized By Law

The Rules of Criminal Procedure provide two additional statements about non-felony arrests in addition to the standard common law rules. Rule 101 states:

> Criminal proceedings in court cases shall be instituted by:
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> . . .
>
> 4. an arrest without a warrant upon probable cause when

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driving would not be arrestable since it is only a summary offense. 75 PA. CONS. STAT. § 3714 (1984).

45. See the discussion of state definitions of felonies in MODEL PENAL CODE AND COMMENTARIES § 1.04 Comment n.8 (Proposed Official Draft and Revised Commentaries 1985). Other states have departed from the Model Penal Code's one year dividing line between felonies and misdemeanors, but none of these makes it higher than 2 years. *See* COLO. REV. STAT. § 18-1-106 (1986) (2 years); DEL. CODE ANN. tit. 11, § 4206 (1983) (2 years); IOWA CODE ANN. § 903.1 (West Spec. Pamph. 1978) (2 years); 13 VT. STAT. ANN. tit. 13, § 1 (1974) (2 years). Massachusetts once set the line at 2 ½ years, but changed it to simply any offense punishable by death or imprisonment in a state prison. MASS. GEN. LAWS ANN. ch. 274 § 1 (West 1970).

46. *See* McBroom, *Enforcement of the Common Law Rules of Arrest: A Handcuffing of Police?* 6 DUQ. L. REV. 363 (1967-68).

> the offense is a misdemeanor not committed in the presence of the police officer making the arrest, when such arrest without a warrant is specifically authorized by statute.[47]

In addition, Rule 51 similarly provides that:

> Criminal proceedings in summary cases shall be instituted . . . by:
>
> . . .
>
> (d) arresting without a warrant when arrest is specifically authorized by law.[48]

An initial problem exists for anyone trying to determine when such "specifically authorized" arrests can take place. These grants of power are not collected in any one place, but instead they are scattered throughout the Crimes Code, the Vehicle Code, and elsewhere.

### *A. Specific Authorizations in Statutes*

Special powers to arrest are granted to a wide variety of law enforcement officers. For example, laws relating to fish and game,[49] probation and parole,[50] and a number of other areas contain special provisions dealing with these matters.[51] But as indicated, this Article is concerned only with arrests by police officers. Thus, the search for the arrest powers that come within the Rules of Criminal Procedure as "specifically authorized" is confined to powers granted to police officers. Furthermore, no special effort will be made to identify all of the powers granted to police officers under such special legislation as the fish and game law, the probation and parole laws, or the like. Instead, a review will be undertaken of the law relating to arrests arising in the ordinary enforcement of laws of more generalized application. Beginning with those contained in the Crimes Code[52] and the Vehicle Code,[53] research has disclosed the following "specifically authorized" arrests.

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47. PA. R. CRIM. P. 101. *See* discussion *supra* text accompanying notes 6-7.

48. PA. R. CRIM. P. 51. This version of the rule has been in effect since 1985. Previously, additional conditions had to be met for a warrantless arrest for a misdemeanor to be valid. These requirements were deleted in the changes. *See* discussion *infra* note 103 and accompanying text.

49. *See, e.g.*, 30 PA. CONS. STAT. § 901 (1980 & Supp. 1984); 71 PA. STAT. ANN. § 766 (Purdon 1962).

50. For a discussion regarding probation and parole violation arrests, see Commonwealth v. Pincavitch, 206 Pa. Super. 539, 214 A.2d 280 (1965).

51. For example, see the discussion concerning constables in In re Borough High Constables, 32 Del. 335 (Pa. Common Pleas 1914). *See also* 13 PA. CONS. STAT. § 45 (Purdon 1967 & Supp. 1987).

52. 18 PA. CONS. STAT. §§ 101-9183 (1982 & Supp. 1986).

53. 75 PA. CONS. STAT. § 101 (1984 & Supp. 1986).

*1. Crimes Code.*—Section 2711 states that if a police officer observes recent physical injury to a victim or other corroborative evidence of domestic violence, he may arrest a spouse, or other person with whom the victim resides or has formerly resided, for involuntary manslaughter, simple assault, aggravated assault, or recklessly endangering another person.[54] All of these would be misdemeanors, but they are made arrestable offenses under this statute even though they were not committed in the officer's presence.[55]

Section 3904 grants a law enforcement officer the same right to arrest without a warrant for any grade of theft as exists in the case of the commission of a felony.[56] Theft offenses can be graded as felonies, misdemeanors, or summary offenses depending on factors such as the value of the goods, the nature of the item taken, and the number of prior theft convictions.[57]

*2. Vehicle Code.*—Section 3731 authorizes a warrantless arrest when the police officer has probable cause to believe the driver was under the influence of alcohol or a controlled substance, regardless of whether the offense occurred in his presence.[58]

Lastly, section 6304 provides:

> Authority to arrest without warrant . . .
>
> (a) Pennsylvania State Police.—A member of the Pennsylvania State Police who is in uniform may arrest without a warrant any person who violates any provision of this title in the presence of the police officer making the arrest.
>
> (b) Other police officers.—Any police officer who is in uniform may arrest any nonresident who violates any provision of this title in the presence of the police officer making the arrest . . . .[59]

When these are viewed as the only four instances in the Crimes Code and the Vehicle Code in which there has been a "specifically

54. 18 PA. CONS. STAT. § 2711 (Supp. 1986).

55. *See also* 35 PA. STAT. ANN. § 10190 (Purdon Supp. 1986), which deals with arrests in Protection From Abuse Cases when there is an existing court order. In those cases there is no need for corroborative evidence.

56. 18 PA. CONS. STAT. § 3904 (1982).

57. There is also authorization for victims and police officers to detain for identification or retrieval of goods in the Retail Theft statute 18 PA. CONS. STAT. § 3929(d) (1982), and the Library Theft statute, 18 PA. CONS. STAT. § 3929.1(d) (1982).

58. 75 PA. CONS. STAT. § 3731 (1984 & Supp. 1986).

59. 75 PA. CONS. STAT. § 6304 (1984).

authorized" grant of the power to arrest under the rules, it does not seem to be a very substantial intrusion on individual liberties. Moreover, the power of a state to expand the authority to arrest for misdemeanors beyond that granted by the common law seems well established. Justice White described a state's power in this area in *Welsh v. Wisconsin*:[60]

> [T]he [common law] requirement that a misdemeanor must have occurred in the officer's presence to justify a warrantless arrest is not grounded in the Fourth Amendment, . . . and we have never held that a warrant is constitutionally required to arrest for nonfelony offenses occurring out of the officer's presence. Thus, 'it is generally recognized today that the common law authority to arrest without a warrant in misdemeanor cases may be enlarged by statute, and this has been done in many of the states.'[61]

In addition, it would seem that each of the authorized situations where warrantless arrests can be made under the Crimes Code and the Vehicle Code could muster strong arguments for its necessity.

In the domestic violence provisions[62] of section 2711, timing is a good reason not to require a warrant, especially when viewed in light of the victim's need for protection. While section 3904's theft offense authorization[63] permits arrests for even the most petty of larcenies,[64] it is reasonable not to have the validity of an arrest depend on factual matters that may be difficult to ascertain at the time of the arrest, such as the value of the goods, or the number of times the person has been convicted of a theft offense.[65]

The Vehicle Code arrest authorizations can similarly be supported by rational argument. Without the grant of authority[66] in section 3731, a police officer who did not personally witness the drunk actually driving the car would be without authority to take effective action.[67] Similarly, section 6304, while perhaps being excessively xenophobic with regard to the authority granted to municipal police

60. 466 U.S. 740 (1984).
61. 466 U.S. at 756 (White, J., dissenting) (citations omitted).
62. 18 PA. CONS. STAT. § 2711 (Supp. 1986).
63. 18 PA. CONS. STAT. § 3904 (1982).
64. *See* Wilgus, *supra* note 4 at 569; *see also* Waite, *supra* note 5 at 451.
65. *See* 18 PA. CONS. STAT. § 3903 (1982).
66. 75 PA. CONS. STAT. § 3731 (1984 & Supp. 1986).
67. Problems can frequently arise after a driver is involved in an accident. Without the authority granted by § 3731, police arriving on the scene who did not witness the person driving could not make an arrest. Since they could not arrest, they could not even gather further evidence of intoxication through breath, blood, or other tests.

officers,[68] can be seen as a rational means of dealing with the problems that nonresidents present. The expansive authority of the State Police is harder to defend on logical grounds and may be impossible to defend completely and consistently given constitutional principles.[69]

### *B. Generalized Authorizations in Statutes*

As illustrated by the case of *Commonwealth v. Neufer*,[70] "specifically authorized" grants of power for warrantless arrests are not found only in the Crimes Code and the Vehicle Code. Local police officers arrested Neufer for the summary offense of "pedestrian under the influence of alcohol." The Vehicle Code provides: "A pedestrian who is under the influence of alcohol or any controlled substance to a degree which renders the pedestrian a hazard shall not walk or be upon a highway except on a sidewalk."[71] The penalty provision states that a person in violation "is guilty of a summary offense and shall upon conviction, be sentenced to pay a fine of $5."[72]

Neufer was later charged with this offense and two other summary offenses — underage consumption of alcoholic beverages and disorderly conduct.[73] In addition, because of a search conducted incident to the arrest in which a small quantity of marijuana was discovered, he was also charged with a misdemeanor drug count.[74] The trial court suppressed the evidence discovered during the search because it determined that the summary offense arrest was not a "specifically authorized" arrest and hence, was illegal.[75]

The Commonwealth appealed this ruling, and the Superior Court reversed. Framing the issues of admissibility in exactly the same way that the trial court had, the court also concluded that there was no specific authorization, as required by Rule 51, in the

68. 75 PA. CONS. STAT. § 6304 (1984).

69. *See also* 71 PA. CONS. STAT. ANN. § 252 (Purdon 1962 & Supp. 1986), which grants extensive powers to Pennsylvania State Police Officers. While the United States Supreme Court seems willing to allow great latitude to the states under the fourth amendment to make warrantless arrests in public for misdemeanors, *see supra* text accompanying note 61, some of the discussion in Welsh v. Wisconsin, 466 U.S. 740 (1980), which took into account the gravity of the offense when it held unconstitutional a warrantless entry into a home, could be argued to apply also to other warrantless arrests for very minor offenses.

70. 264 Pa. Super. 553, 400 A.2d 596 (1979).

71. 75 PA. CONS. STAT. § 3550 (1984).

72. 75 PA. CONS. STAT. § 3552 (1984).

73. 264 Pa. Super. at 555-56, 400 A.2d at 597.

74. *Id.* at 556, 400 A.2d at 597.

75. *Id.* at 557-58, 400 A.2d at 597.

Crimes Code or Vehicle Code for the arrest of a pedestrian under the influence of alcohol.[76] Nevertheless, the Superior Court concluded that the arrest was valid[77] by finding the authority to arrest elsewhere in the laws of Pennsylvania. Specifically, it found it in the Municipal Corporations Law.[78]

Pennsylvania has adopted a code which deals with most aspects of municipal government for cities (subdivided into three classes), townships (subdivided into two classes), and boroughs.[79] Since the police officers that arrested Neufer were officers of a police department of a township of the second class, the court consulted the Second Class Township Code.[80] Among all of the other sections dealing with boundaries, annexations, taxation and the other aspects of local government, it discovered sections providing for the establishment of police services, and defining police powers. The statute on which the court relied as the basis for the lawful arrest in the *Neufer* case provides:

> Each policeman so appointed [under other provisions] shall be an ex-officio constable of the township, and shall and may, without warrant and upon view, arrest and commit for hearing any and all persons guilty of breach of the peace, vagrancy, riotous and disorderly conduct, or drunkenness, or who may be engaged in the commission of any unlawful act tending to imperil the personal security or endanger the property of citizens, or in violating any of the ordinances of said township for which a fine or penalty is imposed.[81]

Comparable authority to that given to police officers in townships of the second class can be found elsewhere in the Municipal Corporations Code for police officers in cities of the first class[82] and third class,[83] as well as in townships of the first class[84] and in bor-

76. *Id.* at 558-59, 400 A.2d at 599.

77. Briefly, the court constructed a complicated path by going through the Vehicle Code's "specifically authorized" statutes in addition to those of the Rules of Criminal Procedure before it found the specific grant. It also discussed at great length how the police officers would have been derelict in their duty if they had not made the arrests in this case. For some unexplained reason the court seemed to indicate that this was important on the issue of the arrest's lawfulness. While this might have been a way of addressing the "necessity" requirement of old Rule 51, *infra* note 108, the court did not identify it as such.

78. 53 PA. STAT. ANN. §§ 101-67605 (Purdon 1972 and Supp. 1986).

79. 53 PA. STAT. ANN. § 101 (1972). Municipalities are classed based on their population.

80. 53 PA. STAT. ANN. §§ 65101-67605 (Purdon 1972).

81. 53 PA. STAT. ANN. § 65591 (Purdon 1972).

82. 53 PA. STAT. ANN. § 13349 (Purdon 1972).

83. 53 PA. STAT. ANN. § 37005 (Purdon 1972).

84. 53 PA. STAT. ANN. § 56403 (Purdon 1972).

oughs,[85] but apparently not in cities of the second class.[86] Or more succinctly, such police authority exists in every municipality except Pittsburgh.[87]

One important feature should be noted about these statutes. The arrests that are authorized by these statutes require that the acts be committed "upon view," that is, in the officer's presence.[88] Thus, to the extent that these offenses could be characterized as being of the level or quality of a misdemeanor in the common law, an arrest for them without a warrant would be defensible.[89] Actually, even this assertion requires considerable qualification.[90] The problem, of course, is that most of the offenses mentioned in the statute are not misdemeanors, but instead are summary offenses today. Here again, the Pennsylvania grading of offenses departs from the more generalized views regarding the grading of offenses.

As indicated earlier, the Model Penal Code set the dividing line between a felony and a misdemeanor at one year, while Pennsylvania's Crimes Code differs substantially.[91] The next step for the Model Penal Code was the creation of a category which it denominated as a "violation" as distinguished from a "crime." The explanatory note to the section on violations in the Model Penal Code indicates that the section "creates a noncriminal class of offenses . . . for which only a fine or other civil penalty is authorized. It is envisaged that this class will primarily include regulatory offenses based on strict liability and certain minor offenses such as traffic violations."[92] Pennsylvania departed from this idea in the creation of its summary offense category. In addition to the imposition of fines, many summary offenses are punishable by imprisonment for a term of up to ninety days.[93] While it is true that very minor offenses with

85. 53 PA. STAT. ANN. § 46121 (Purdon 1972). Similar powers are also conferred on police officers of Second Class Counties (only Allegheny County). 53 PA. STAT. ANN. § 4501 (Purdon 1972).

86. 53 PA. STAT. ANN. § 65591 (Purdon 1972).

87. The City of Pittsburgh is the only city in the Commonwealth that is a city of the second class.

88. The terms "on view" and "presence" are used interchangeably.

89. *See* cases cited *supra* note 11.

90. In fact they may be considered "civil" penalties and, therefore, not within the common law rules. *See* Wilgus *supra* note 6, at 551, 577. It might also be necessary for these to amount to a breach of the peace. *Id.* at 573.

91. *See supra* note 15 and accompanying text; *supra* text accompanying notes 22-36.

92. MODEL PENAL CODE *supra* note 3, § 1.04 Explanatory Note (1985).

93. 18 PA. CONS. STAT. § 106(c) (1982). The term "Summary Offense" was already employed by Pennsylvania as a classification for minor offenses prior to the adoption of the Crimes Code. It appears that this term was continued in the Crimes Code rather than the Model Penal Code's "violation" because it was a familiar one. *See* DRAFT CODE *supra* note 25, § 107 Comment.

very minor penalties (like the pedestrian under the influence offense in *Neufer*) are most often the sort of offenses put into this category, there are some surprising ones too. For instance, section 3733 of the Vehicle Code provides that a driver who flees or attempts to elude a pursuing police officer is guilty of only a summary offense.[94]

Although summary offenses are not crimes as defined under the Crimes Code[95] and arrests would not be permitted under common law principles, the significance of this point to the present law of arrest is probably irrelevant in practical terms since Rule 51 specifically recognizes the possibility of arrests in these cases.[96] Thus, arrests for misdemeanors not committed in the officer's presence and summary offenses committed in his presence fall into the same category. Each requires that some "specifically authorized" provision be located to authorize an arrest.

The difficulty generated by *Neufer* is the breadth of the authority to arrest conferred by the statute construed in that case. The statute ostensibly authorizes the arrest of individuals for a wide variety of matters, but many of these are not offenses at all. This raises the question of whether a person can be arrested even though no offense has been committed. For example, the statute authorizes an arrest for vagrancy. Pennsylvania once had laws addressing vagrancy that were later repealed.[97] But even when statutes dealt with vagrants, they were poor laws and workhouse laws — quite emphatically not criminal laws — which permitted such people to be put to work (or sent from the state), but not imprisoned.[98] Without attempting to defend it, perhaps a statute authorizing the transportation of vagrants to workhouses (via hearings before justices of the peace) through an arrest law made sense at one time. But what is its significance today when the term "vagrancy" does not legally exist except in a statute authorizing arrest for it? Similarly, there are no offenses called "breach of the peace"[99] or "drunkenness."[100]

One of the broadest authorizations for a warrantless arrest con-

94. 75 PA. CONS. STAT. § 3733 (1984) (punishable only by fine).

95. 18 PA. CONS. STAT. § 106(b) (1982).

96. PA. R. CRIM. P. 51. The rule adds a layer of confusion by indicating that "criminal" proceedings in "summary" cases can be brought in different ways.

97. Act of June 13, 1836, 1836 Pa. Laws 539, (formerly 18 PA. STAT. ANN. § 2032-41, repealed Act of Dec. 6, 1972, 1972 Pa. Laws 1482).

98. *Id.*

99. *But see infra* text accompanying note 105.

100. These terms, could, of course, be analogized to disorderly conduct (but that was already mentioned separately) or public intoxication that are summary offenses. *Neufer* used the "drunkenness" provision to validate the warrantless arrest of a "pedestrian under the influence."

ferred by these statutes is the power to arrest for violations of municipal ordinances. Most municipalities have a wide array of ordinances that cover all sorts of activity. Without any qualification of the power granted by these arrest laws, it seems permissible for individuals to be arrested for very trifling offenses, like that of a homeowner who didn't mow his lawn.[101] As far as can be determined *Neufer* is the only appellate court case that has upheld the authority of an arrest on the basis of these provisions of the Municipal Corporation Law statutes.[102]

### C. *Breach of the Peace Authorizations*

In addition to the grants of authority to make warrantless arrests discussed in the preceding sections, authorization may also exist in Pennsylvania to make an arrest whenever the offense amounts to a "breach of the peace." The support for this authorization derives from two different sources beyond the Municipal Corporations Law discussed in the preceding section.

*1. Breach of the Peace Under the Rules of Criminal Procedure.*—Earlier versions of the Rules of Criminal Procedure authorized an arrest without a warrant when:

> . . .the offense is a summary offense which involves a breach of the peace, or endangers property or the safety of any person present provided the police officer making the arrest displays a badge or other symbol of authority or is in uniform.[103]

The authority to make an arrest under such a rule has been discussed in several cases.[104] In general, the courts upheld the validity of arrests under this rule when the offense that was charged itself

101. It is of interest to note that based on these statutes, an argument was once advanced that municipal police officers could only arrest for these offenses and could not arrest for other crimes like murder. *See* Commonwealth v. England, 474 Pa. 1, 375 A.2d 1292 (1977). This argument was rejected. 474 Pa. at 11, n.6, 375 A.2d at 1297, n.6. To prevent recurrences of this sort of problem, the Municipal Police Jurisdiction Act gives police authority to "enforce the laws of the commonwealth." 42 PA. CONS. STAT. § 8952 (1982). The act deals with several police jurisdiction issues, especially those involved when police officers leave their primary jurisdictions. The act does not address, let alone resolve the issues being discussed here in the text.

102. Several cases have discussed comparable municipal police power statutes. *See* United States v. Crutchfield, 418 F. Supp. 701 (W.D. Pa. 1976); Commonwealth v. Pincavitch, 206 Pa. Super. 539, 214 A.2d 280 (1965).

103. PA. R. CRIM. P. 51(A)(5), 19 PA. STAT. ANN. (Purdon 1984) (in effect through 1975, but replaced in 1975 with the immediate predecessor of the present rule quoted *infra* at note 110).

104. *See, e.g.*, Commonwealth v. Alford, 321 Pa. Super. 257, 467 A.2d 1351 (1983), and cases cited therein.

amounted to a breach of the peace. But when the offense that was charged did not amount to a breach of the peace on its own terms, the arrest was invalidated. For example, in *Commonwealth v. Shillingford*,[105] the Superior Court held that the warrantless arrest of a minor for the summary offense of underage drinking was not lawful. This result was reached even though the court indicated that the minor could have been lawfully arrested for public drunkenness. This would have been valid, the court intimated, because the public intoxication offense[106] contained an element of annoying others which would have amounted to a breach of the peace.[107] In other words, it seems that under the old rule the crime was assessed in the abstract without regard to the facts of the case.

At various times, the courts have reviewed the different breach of the peace authorizations for warrantless arrests that were provided for under the Rules of Criminal Procedure. They upheld arrests that were made in compliance with those rules and voided those that were not. The focus was always on the rule. But in 1975, the rule was changed to the following:

> The defendant may be arrested without a warrant by a police officer for a summary offense, but only when, (i) such arrest is necessary in the judgment of the officer, and (ii) the officer is in uniform or displays a badge or other sign of authority, and (iii) such arrest is authorized by law . . . .[108]

Two quick observations can be made about the effect of this rule. First, the specific authorization for a "breach of the peace" arrest was no longer in the rule. Second, subsection (i) seemed to place limitations on "otherwise authorized" arrests by requiring some kind of necessity for the arrest. The "necessity" requirement could be seen as a limitation on the authority to arrest under other provisions even when the power to arrest was specifically granted. The rule, however, was changed again in 1986 to its present form that deletes the "necessity" requirement.[109] At the same time, the new rule contains no "breach of the peace" exception. Now, the only question is whether the arrest is "specifically authorized." Thus, earlier cases that found authority for breach of the peace arrests under prior versions of the rules are probably no longer valid since their underlying

105. 231 Pa. Super. 407, 332 A.2d 824 (1975).
106. 18 PA. CONS. STAT. § 5505 (1982).
107. 231 Pa. Super. at 411 n.6, 332 A.2d at 824 n.6.
108. PA. R. CRIM .P. 51, 42 PA. CONS. STAT. ANN. (rescinded 1986). (Discussed in Commonwealth v. Alford, 321 Pa. Super. 257, 467 A.2d 1351 (1983).)
109. PA. R. CRIM. P. 51.

support has been withdrawn.

*2. Breach of the Peace Arrests under the Common Law.*—In 1983, after the changes in the rules described in the preceding section, another warrantless summary offense arrest case came before the Superior Court. In *Commonwealth v. Alford*,[110] the court upheld the arrest by citing the *Shillingford* case which had been decided under the prior "breach of the peace" rule. The court dealt with the changed rules by writing in a footnote:

> Shillingford was decided under a prior version of the Criminal Rules, which were revised in 1975. However, the official Comment to those revisions states:
>
> > "[t]he 1975 amendment was *not intended to change the scope of an officers power of warrantless arrest in summary cases*, but to make it clear that such arrest is permitted under the Rule only where such power exists at common law or under the laws of the General Assembly."
>
> We also note that while no statutory grounds were asserted for the officer's authority in this case, such power exists at common law where a breach of the peace is involved.[111]

The rule at the time of the *Alford* decision was the "necessity" rule. It is possible, therefore, that the Comment quoted by the court felt that the prior rule was covered by the "necessity" requirement. The last paragraph of the footnote in *Alford* introduces an additional basis for breach of the peace arrests — Pennsylvania common law. *Commonwealth v. Doe*[112] was cited by *Alford* as authority for this assertion. The entire discussion of this issue in the *Doe* case was:

> Under the old English law in a case of affray, or any other action, which would tend to be a breach of the peace, constables are authorized to arrest, without warrant. Our law recognizes the same right in them, and under our statutes they have the right to seize gambling devices, or arrest, on view, persons violating certain provisions of the game and forest laws, and those regarding the pollution of streams, etc.[113]

Each of the *Doe* court's examples was a distinct legislative grant.

110. 321 Pa. Super. 257, 467 A.2d 1351 (1983).
111. *Id.* at 260 n.5, 467 A.2d at 1352-53 n.5.
112. Commonwealth v. Doe, 109 Pa. Super. 187, 167 A. 241 (1933).
113. *Id.* at 189-90, 167 A.2d at 241-42.

The court in *Doe*, therefore, might very well have been indicating that the "our law" that recognized the lawfulness of a breach of the peace arrest was our statutory law, not our judicial, common law. Each of the *Doe* court's examples indicates a legislative authorization. But, in *Alford*, the court seems to convert these breaches of the peace into a broader common law application.

Consequently, although it may be tenuous, it can be argued that a common law basis for a warrantless arrest for a breach of the peace is currently available in Pennsylvania. Since a "breach of the peace" might authorize a warrantless arrest, however, it becomes necessary to define this phrase. Historically, the term arose centuries ago in connection with arrests and the service of warrants on Sunday; the law permitted arrest and service of warrants on Sunday only if the underlying offense was a treason, felony, or breach of the peace.[114] The definition of what amounted to a breach of the peace was far from clear,[115] and it is not much easier to state today. Perhaps the best explanation for purposes of Pennsylvania law comes from the case of *Commonwealth v. Sherman*.[116] After surveying the meaning of "breach of the peace" at common law, the court concluded as follows:

> The more convincing authorities of our own state and many to be found in other jurisdictions lead us to the conclusion that . . . to constitute a breach of the peace there must be some act of violence committed or threatened. Noise and disturbance, though coming from a more or less large assemblage of persons, must have given rise to some act of violence or must incite terror or fear, or threaten or invite some act of violence to breach the peace.
>
> At least, we may go so far as to say that it is only such a breach of the peace as we have described as will justify an officer in making an arrest without a warrant . . . .[117]

Central to the ideas expressed in *Sherman* are that the acts involved must be violent in some way. Acts that are only disorderly, disturbing, and annoying, however, are therefore, under this view, not of a level that amounts to a breach of the peace.[118] But then,

114. *See* Wilgus, *supra* note 4, at 574.
115. *Id.*
116. 14 Pa. D. & C. 4 (1930).
117. *Id.* at 14.
118. *See also* Wilgus, *supra* note 4, at 573-76.

perhaps one should take into account the ideas of breach of the peace discussed in *Shillingford*, where it seems that the court's discussion concerning the validity of an arrest for public intoxication would encompass more than the common law "breach of the peace" violence notions by indicating that mere public annoyances might qualify.[119] However, the *Shillingford* case was decided under the old version of the Rules of Criminal Procedure and could be argued to apply only to them, not to the common law. The result is that the common law breach of the peace exception is far from clear in either its scope or even its present availability. This may bring the "breach of the peace" exception right back to the Municipal Corporations Law as its source. But the "breach of the peace" authorized there is no easier to define.

## IV. The Personal Identification Problem

One final problem must also be mentioned that is directly connected to the law of arrest and can arise in a wide variety of situations. Suppose a person has committed a misdemeanor or a summary offense for which an arrest is clearly not authorized. In such a situation, a police officer is expected to use a citation, summons, or a warrant. But if the person refuses to identify himself to the police officer, the officer would not know who to name in the process. At the same time, however, as long as the person commits no other arrestable offense (or, to encompass the earlier discussion, is not breaching the peace), there is no authority for taking such a person into custody. Obviously, such a situation can substantially undermine the enforcement process. Once more the "hit and run" example in the introduction provides an illustration. What can be done when the second police officer sees the automobile described by the radio broadcast? It is probably lawful for the police officer to stop the vehicle.[120] He can probably check the car for any evidence of the collision.[121] He can also ask the driver of the car for identification.[122] But if the driver refuses to identify himself, so long as he does so quietly without breaching the peace, how will the officer even know who to

119. *See supra* note 106 and accompanying text.

120. *See* United States v. Sharpe, 470 U.S. 675 (1985).

121. *See* United States v. Place, 462 U.S. 696 (1983). Of course, attempts to determine whether the vehicle was stolen and, perhaps, who the owner was would be permissible. At the same time, it would not be permissible to search either the interior of the vehicle or the driver, except for weapons.

122. A driver is required to exhibit a driver's license to a police officer upon demand under the Vehicle Code. 75 PA. CONS. STAT. ANN. §§ 1511, 1571 (Purdon 1977). Violation of this provision, however, is a summary offense.

name in a citation, summons, or warrant? At present, there is no way to deal with this situation under Pennsylvania law.[123] Without some method of handling such a case in a lawful way, however, the entire system of enforcement of non-arrestable offense cases is jeopardized.

This situation could be dealt with in a number of ways. One alternative would be to make the failure to identify oneself when lawfully stopped an arrestable offense.[124] Another way would be to allow police officers to detain such people until they are identified. This approach could be analogized to civil contempt. Once detained, as soon as a person identifies himself, he would be released. Thus, in the same way that a person can purge himself in the contempt cases, the detained person holds the keys to his freedom.[125] If either of these alternatives is adopted, care must be taken to prevent the power created from becoming an instrument of oppression. Nevertheless, in some fashion, attention must be given to the personal identification problem because it is tied so closely to a system designed to permit arrests for only the most serious offenses. It should be stressed that this applies to both misdemeanors not committed in the officer's presence and summary offenses. Without some mechanism to deal with the identification problem, prosecutions for

123. Perhaps arguments could be made that an officer in this situation could assume that the car was stolen, thus making it an arrestable offense. *See* Commonwealth v. Woodard, 307 Pa. Super. 293, 453 A.2d 358 (1983); Commonwealth v. Bowser, 212 Pa. Super. 494, 243 A.2d 205 (1968). It would not seem that there would be probable cause to support this assumption however. Alternatively, it could be argued that anyone who would not identify himself could be assumed to be a non-resident and therefore arrestable for Vehicle Code violations under 75 PA. CONS. STAT. § 6304 (Purdon 1977); *see supra* text accompanying note 59. Lastly, an argument might be suggested that the situation presents an exigent circumstance as in Michigan v. Tyler, 436 U.S. 499 (1978) (ongoing fire); United States v. Santana, 427 U.S. 38 (1976) (hot pursuit of a fleeing felon); or Schmerber v. California, 384 U.S. 757 (1966) (destruction of evidence). This argument might be quite weak, however, after Welsh v. Wisconsin, 466 U.S. 740 (1984). In that case, although it concerned entry onto private property to make a felony arrest, the Court stated:

> Our hesitation in finding exigent circumstances, especially when arrests in the home are at issue, is particularly appropriate when the underlying offense for which there is probable cause to arrest is relatively minor . . . . When the government's interest is only to arrest for a minor offense, [the] presumption of unreasonableness is difficult to rebut, and the government usually should be allowed to make such arrests only with a warrant issued upon probable cause by a neutral and detached magistrate.

466 U.S. at 750.

124. *But see* Brown v. Texas, 443 U.S. 47 (1979) (fourth amendment requires reasonable suspicion of criminal activity in order for the stop to be deemed lawful); Kolender v. Lawson, 461 U.S. 352 (1983) (statute must set forth with clarity what manner of identification will satisfy its requirement in order to avoid unconstitutional vagueness).

125. This might also be viewed as similar to the theft detainer authorizations. 18 PA. CONS. STAT. §§ 3929(d), 3929.1(d) (1982).

even relatively serious offenses may be thwarted.

## V. Alternatives to the Present Law of Arrest

In the discussion above, a variety of different problems with regard to the present state of the law of arrest in Pennsylvania came to light. In some ways, each of the matters presented can be seen as presenting a separate issue, but there also seems to be a larger problem involved in the relationship of all of these different provisions to each other. Consequently, it seems appropriate to consider what the alternatives to the present system might be and how they can be brought about.

### *A. Permitting Arrests for More Serious Offenses*

The example of the "hit and run" driver pointed out how the present classification of offenses in the Pennsylvania Crimes Code would prevent an arrest in that case. While there are strong arguments against altering the present scheme if it is seen as an efficient vehicle for limiting official intrusions in citizens, no position will be taken on the merits of any of the arguments surrounding that issue. Instead, the question to be addressed is how the present law can be changed, and what some of the implications of a change might be.

*1. Change the Crimes Code Classifications.*—The principal reason for a Pennsylvania arrest law more restrictive than those found elsewhere is traceable to the Crimes Code classification of offenses.[126] When the drafting committee altered the Model Penal Code's sentencing schedule which was provided through the Model Penal Code's classification of offenses, the evidence suggests that they did so without being aware of the collateral effect this would have on the law of arrest.[127] One simple way to broaden the arrest law would be to reclassify as felonies all offenses that are presently misdemeanors. The present array of available sentences could simply be retained under the new classifcations. Thus, it would not be necessary to alter the penalties attached to any offense, or for that matter, change the Crimes Code in any other way to have a significant impact on the law of arrest.

The present misdemeanors of both the first and second degree are punishable by more than two years imprisonment; therefore, they are well above the generally accepted level of severity for determin-

126. *See supra* text accompanying note 29.
127. *See supra* note 35.

ing whether a crime is a felony. Misdemeanors of the third degree are right on the line.[128] Nevertheless, it would almost certainly be permissible to reclassify offenses in these categories as felonies if that were desired.

It may nonetheless be suggested that the term "felony" should be restricted to only the most serious offenses. Conviction for a felony has for centuries carried with it a connotation of extreme culpability and depth of blameworthiness. While only rarely do more significant disabilities now attach to a felon than to a misdemeanant,[129] it still might be argued that this category should be reserved for only the most heinous offenses.

*2. Change the Rules of Criminal Procedure.*—Another simple way to transform the law of arrest into a broader grant of authority is through a different statement of Rule 101. While the Rule is a codification of the common law of arrest,[130] because of the reclassification of offenses that was undertaken in the Crimes Code, the terms of Rule 101 do not have the same practical meaning in Pennsylvania that they have in many other states.[131] It is not necessary for Pennsylvania to adhere to this form of the statement of the common law rules. Given the present sentencing structure of the Crimes Code with regard to misdemeanors, it would be completely permissible for the rules to authorize a warrantless arrest for misdemeanors based on probable cause without the presence requirement. This could be accomplished by indicating the permissibility of arrests for "crimes" which would include both felonies and misdemeanors, but not summary offenses. Indeed, this is exactly what some other states have done. For example, New York's Criminal Procedure Law provides: "a police officer may arrest a person for . . . [a] crime when he has reasonable cause to believe that such person has committed such crime, whether in his presence or otherwise."[132] In New York, the term "crime" includes both felonies and misdemeanors,[133] as it does under the Pennsylvania Crimes Code.[134]

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128. *See supra* note 14 and accompanying text.

129. Some do still attach such as those effecting some professional licensures. *See, e.g.*, PA. STAT. ANN. tit. 63, § 224 (Purdon Supp. 1986) (nurses); PA. STAT. ANN. tit. 63, § 9.9A (Purdon Supp. 1986) (accountants); PA. STAT. ANN. tit. 63, § 123.1, 124.1 (Purdon Supp. 1986) (physicians).

130. *See supra* note 4.

131. *See supra* note 45 and accompanying text.

132. N.Y. CRIM. PROC. LAW § 140.10(1)(b) (McKinney 1981).

133. *See* N.Y. CRIM. PROC. LAW § 140.10, Practice Commentary (McKinney 1981).

134. 18 PA. CONS. STAT. § 106(b) (Purdon 1983).

### *B. Changes That Can Be Made to Prevent Arrests for Trivial Incidents*

There are several obvious ways in which the present law of arrest could be put in order. First, more thoughtful judicial clarification of the permissible scope of police authority in this area is essential. Closer attention is required to the question of when an arrest can be made for a summary offense or other minor violation. This question can not be adequately addressed through a common law breach of the peace exception. Even if the meaning of this exception were sufficiently clear, it is an inadequate basis for determining when arrests should be made. Certainly, not all breaches of the peace should be arrestable, nor should it be left to the individual police officer's discretion without clearer guidance. Moreover, there are some instances in which arrests should be authorized even in the absence of a breach of the peace.[135]

While the judiciary can provide better statements in this area, a case involving these issues must be presented. Any attempt to provide a broad-based coherence can be extremely difficult if only a fragment of the larger problem is presented in any particular case. Also, this kind of judicial examination of these issues can only take place after someone has already been arrested — perhaps for not mowing his lawn.

Apart from the case by case approach, there is one other avenue open to the judiciary. The Rules of Criminal Procedure can be changed to avoid the open-ended "specifically authorized" language of Rule 51. Express statements could clarify when arrests for summary offenses, violations of municipal ordinances, or other minor infractions are authorized. In this regard, at least, the earlier rules had considerable virtue.

Legislative solutions to the problems plaguing the present arrest law would probably be more effective. One of these solutions might be to consolidate all of the "specifically authorized" grants of the power to arrest in one place, perhaps the Judicial Code. This would be extremely cumbersome and would not solve the major problem with this area of the law. The law of arrest in Pennsylvania is a patchwork of statutes dating at least from 1876[136] that may be both outdated and in conflict with each other.

Probably the best solution would be a modern, comprehensive

135. *See supra* note 123 and accompanying text.

136. This was the original date that the statute *Neufer* relied on was enacted.

Arrest Code.[137] The process of adopting a new arrest law would have the advantage of permitting an open debate about the desirability of allowing police officers to arrest for very minor infractions, such as violations of municipal ordinances, while at the same time being denied arrest power in relatively serious misdemeanor cases. This approach could also be used to deal with the felony/misdemeanor classification problem if that were deemed desirable.

## VI. Conclusion

The significance of the lawfulness of an arrest is substantial for several reasons. First and foremost is the direct illegality of the arrest. Police officers should not exercise coercive power if they are not authorized to do so, and citizens should not have to suffer the indignities of unlawful police activity. Although a person who has been unlawfully arrested can still be prosecuted for the offense,[138] he is nonetheless a victim of unlawful activity. Further, the police officer in such a case could potentially be exposed to a civil damage suit. Second, the derivative aspects of an arrest are often far more important than the actual arrest itself. For instance, to the extent that a search is conducted incident to an arrest and evidence is discovered, the admissibility of the evidence may[139] depend on the lawfulness of the arrest. Whether this is evidence of the crime for which the person was initially arrested or of a new and perhaps far more serious offense, the arrest is central. Consequently, it is in everyone's interest that the law of arrest be clear and understandable. Unfortunately, neither quality is present in the current arrest law of Pennsylvania.

This Article has portrayed three different sets of problems that presently exist in the law of arrest in this state. First, Pennsylvania has restricted the authority of police officers to make warrantless arrests for crimes not committed in their presence to a relatively narrow band of offenses. Second, police officers seem to possess an extremely broad authority to arrest for some offenses that are committed in their presence, even when these offenses are of only the most trivial sort, often not even crimes. Third, there exists an arcane

137. *See, e.g.*, MODEL CODE OF PREARRAIGNMENT PROCEDURE (Proposed Official Draft 1975).

138. *See* Michigan v. Doran, 439 U.S. 282 (1978); Frisbie v. Collins, 342 U.S. 519 (1952); Ker v. Illinois, 119 U.S. 436 (1886).

139. Not all illegalities in an arrest will result in the operation of the exclusionary rule. *See, e.g.*, Commonwealth v. Saul, 346 Pa. Super. 155, 499 A.2d 358 (1985) (arrest outside primary jurisdiction by police officer in violation of Municipal Police Jurisdiction Act does not demand that exclusionary rule be applied).

system of law that demands that one travel a tortuous path in order to determine the lawfulness of many of these arrests.

Whether police officers should be granted or denied the authority to make arrests in the situations that have been presented requires that judgments be made about the proper scope of arrest power balanced against considerations of individual dignity and liberty. The purpose of this Article was not to indicate the correctness or desirability of any of the choices that are already implicitly expressed in the present law or to provide an agenda for law reform in this area. Rather, the objective was to indicate that the present law of arrest in this state implies certain policy choices but these "choices" were not the product of reasoned debate. In many respects, the law that purports to govern this area is in such a state of organizational chaos that reliable predictions about the lawfulness of many arrest powers are impossible to make.